admitting those statements at trial was harmless beyond a reasonable doubt." Pet. App. 12a. The court found that petitioner's admissions that he knew some of the co-conspirators and had used methamphetamine with them "were either corroborated by other government witnesses or were immaterial to the case." *Id.* at 13a. In addition, the court reasoned, the testimony of those witnesses "went largely unchallenged." *Ibid.* The court also noted that petitioner used his statements to the police to his advantage at trial by emphasizing his "vehement[] deni[al] [of] selling or distributing methamphetamine" during his jailhouse statement and arguing it was proof of his innocence "because a police officer who was trained to elicit the truth from suspects could not elicit an admission of distribution from [petitioner]." *Ibid.* Accordingly, the court concluded, "the introduction of [petitioner's] jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute." *Ibid.* Finally, the court noted that in addition to petitioner's statements, the government presented eight witnesses who testified about petitioner's possession and distribution of methamphetamine. Although the individual witnesses' credibility could be questioned because of their plea bargains, criminal histories, and drug use, the court concluded that the government's evidence proved that petitioner "conspired to possess methamphetamine with intent to distribute." *Id.* at 13a-14a.

## ARGUMENT

Petitioner contends that his jailhouse statements should have been suppressed as the fruits of an earlier violation of Sixth Amendment standards and that the

court of appeals erroneously relied on *Oregon* v. *Elstad*, 470 U.S. 298 (1988), in holding otherwise. The court of appeals' decision rejecting petitioner's claim is correct and does not conflict with any decision of this Court or of any other court of appeals; indeed, the United States is unaware of any other court of appeals decision that even has addressed whether the rationale of *Elstad* applies in the Sixth Amendment context, cf. Pet. 14. Even if *Elstad* did not apply, petitioner still could not establish that his statements should be suppressed as fruits. And, finally, as the court of appeals concluded, any error in the admission of petitioner's jailhouse statements was harmless beyond a reasonable doubt. For all of those reasons, further review is not warranted.

1. Petitioner contends (Pet. 11-23) that this Court should grant review to make clear that the rationale of *Oregon* v. *Elstad*, *supra*, does not apply in the Sixth Amendment context, and that instead, the broad derivative-evidence exclusion developed for completed Fourth Amendment violations should be applied under such circumstances. That claim lacks merit.

a. In *Oregon* v. *Elstad*, this Court rejected the claim under the Fifth Amendment that a suspect's giving of an initial voluntary statement without *Miranda* warnings tainted his later voluntary statement made after he received warnings and waived his rights. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, this Court concluded that, "absent deliberately coercive or improper tactics in obtaining the initial statement," a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the

earlier statement." 470 U.S. at 314. The Court explained that, in the absence of police coercion, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318.

As the court of appeals concluded, the rationale of *Elstad* is equally applicable in this context. In *Elstad*, the Court reasoned that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to ~~make a~~ statement to the authorities." 470 U.S. at 308. The same is true with respect to an indicted defendant's decision whether to deal with questioning by the police "with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). Because the assistance of counsel serves a similar role during pretrial questioning by the police regardless of whether the right to counsel arises under the Fifth or Sixth Amendment, this Court has held that advising an accused of his *Miranda* rights is generally sufficient to permit a knowing and intelligent waiver of the Sixth Amendment right to counsel during police questioning. *Id.* at 298-299 & n.12. The *Miranda* warnings convey to the accused at the time of questioning "the sum and substance of the rights that the Sixth Amendment provide[s]." *Id.* at 293. The warnings thus "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." *Id.* at 294. Once an indicted defendant has received that information through *Miranda* warnings, it neutralizes the earlier police error

in conducting unwarned questioning and can render the later statement admissible.

b. Petitioner contends (Pet. 16-19) that the rationale of *Elstad* is inapplicable here because counsel serves a different role in the Sixth Amendment context: "the assistance of counsel ensures 'equality in [the] adversary confrontation' by protecting the accused from his own 'lack of familiarity with the law,'" and by "advis[ing] the defendant whether it is in his best interest, in light of the charges against him, to speak or remain silent." Pet. 19 (quoting *United States* v. *Ash*, 413 U.S. 300, 317 (1973)). Also, petitioner claims (*ibid.*), counsel serves a "broader Sixth Amendment interest in those circumstances where government officers have previously * * * elicited incriminating information from a defendant," because counsel could "inform the defendant * * * of the legal rules concerning the admissibility of the prior * * * statement." Pet. 17. But as the Court held in *Patterson*, the *Miranda* rights "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." 487 U.S. at 294. Even if the warnings themselves do not provide all the legal advice an attorney could, they equip a suspect to make the decision whether to speak with police immediately without the assistance of counsel, or to wait for counsel to advise him on those matters before again speaking to police. See *id.* at 291.

c. Petitioner also contends (Pet. 14-16) that the rationale of *Elstad* is premised on the fact that unwarned interrogation is only a violation of the prophylactic *Miranda* rule rather than the Fifth Amendment itself. He therefore argues that it does not apply here because the deliberate elicitation of a response from an accused constitutes a completed violation of the Sixth Amend-

ment. The Court's opinion in this case pointedly avoided stating that the officers' deliberate elicitation at petitioner's home violated the Sixth Amendment, instead stating only that their actions "violate[d] the Sixth Amendment *standards* established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)] * * * and its progeny." Pet. App. 21a (emphasis added); *id.* at 22a (discussing "police questioning in violation of Sixth Amendment *standards*") (emphasis added). See generally *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting) ("It is * * * the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim."); accord *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977).

But even if there were a completed Sixth Amendment violation at the time of unwarned questioning, *Elstad*'s rationale would still apply in this context. There is no question that this Court has recognized a limited "fruits" doctrine as applied to certain forms of derivative evidence after the denial of counsel at a critical stage in the prosecution. See *United States* v. *Wade*, 388 U.S. 218 (1967); *Nix* v. *Williams*, 467 U.S. 431 (1984). As discussed below, however, neither case involved the accused's own subsequent statements. When such statements *are* involved, the critical factor in determining whether "fruits" analysis applies is that the infringement of Sixth Amendment standards in conducting unwarned deliberate elicitation is closely analogous to the omission of *Miranda* warnings in *Elstad*. In both cases, there is a failure to ensure that the suspect could make an intelligent choice whether to waive his rights—and in both cases, the provision of that information breaks any link to the antecedent unwarned questioning.

Relying on *Wade* and *Nix*, petitioner contends (Pet. 12-13) that this Court has already held that "the traditional derivative-evidence rule" in the case of Fourth Amendment violations applies in determining whether a defendant's voluntary, warned statement is the fruit of a prior Sixth Amendment violation. Those cases—both of which predate *Elstad*—do not govern this context. In *Wade*, the Court only held that a post-indictment lineup was a critical stage under the Sixth Amendment and remanded for the lower courts to determine whether a witness's in-court identification of the defendant was tainted by an earlier post-indictment lineup conducted without the presence of counsel. 388 U.S. at 239-243. The Court's remedy directly protected the adversary process at trial, by requiring examination of whether the later in-court identification was the product of the earlier denial of counsel. In *Nix*, the Court rejected a defendant's claim that physical evidence (of the location and condition of a murder victim's body) should not have been admitted at his trial because it was the fruit of officers' earlier elicitation of incriminating statements, in violation of his right to counsel. The Court noted that it had applied the "fruit of the poisonous tree" doctrine to Sixth Amendment violations, 467 U.S. at 442 (citing *Wade*), but held that the evidence was properly admitted under the inevitable-discovery exception to the exclusionary rule because the victim's body would inevitably have been discovered. *Id.* at 440-450.

In this case, unlike *Wade* and *Nix*, the evidence claimed to be the fruit of a prior Sixth Amendment violation is a second statement voluntarily made by a defendant after receiving *Miranda* warnings and knowingly and intelligently waiving his right to counsel. In this situation, the defendant's decision to speak to the offi-

cers without counsel is an independent act of free will that breaks the causal link to the prior illegality. *Elstad* thus supplies the appropriate framework for analysis and ensures that a proper balance is struck between protecting the defendant's right to counsel and honoring his free choice to waive it.[3]

This does not, as petitioner contends, make *Miranda* warnings a "cure-all" (Pet. 22) or "provide[] the police with a road map to eviscerate the right[s] of criminal defendants," Pet. 11. The argument that police might find in the decision below a "road map" to secure admissible statements by deliberately violating Sixth Amendment standards ignores this Court's analysis in *Missouri* v. *Seibert*, 124 U.S. 2601 (2004), which suggests that a later set of *Miranda* warnings would not be effective if officers had purposely conducted unwarned questioning to undermine later warnings. *Id.* at 2610-2613 (plurality opinion) (requiring objectively effective warnings and distinguishing *Elstad*); *id.* at 2614-2616 (Kennedy, J., concurring in the judgment) (curative measures required, beyond those in *Elstad*, when officers deliberately use a two-step technique to undermine *Miranda* warnings).[4]

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[3] *United States* v. *Patane*, 124 S. Ct. 2620 (2004), which petitioner also cites (Pet. 13), is even less helpful to him. *Patane* did not involve a Sixth Amendment violation at all, and the plurality opinion merely cited *Nix* in passing as "discussing the exclusionary rule in the Sixth Amendment context and noting that it applies to 'illegally obtained evidence [and] other incriminating evidence derived from [it].'" 124 S. Ct. at 2629 (quoting *Nix*, 467 U.S. at 441).

[4] As the court of appeals held (Pet. App. 12a), there is nothing in the record here to suggest that the officers employed a deliberate strategy to undermine the effectiveness of the later warnings. See n.2, *supra*; cf. *Seibert*, 124 S. Ct. at 2612 n.6 (plurality opinion).

Petitioner also errs in claiming (Pet. 23) that extending the *Elstad* rationale to the Sixth Amendment context would mean that "nothing at all is changed by the fact that the government has violated" Sixth Amendment standards. A later set of warnings does nothing to permit the admission of the initial unwarned and uncounseled statement. And when the defendant gives a second statement after knowingly and intelligently waiving counsel, the government must still establish that the waiver of rights was voluntary. *Patterson*, 487 U.S. at 292 n.4. Badgering or misleading conduct by authorities may preclude such a showing. *Harvey*, 494 U.S. at 353-354. Where investigators obtain the unwarned initial statement through coercion or the application of excessive psychological pressure, the defendant may not be able to make a knowing and voluntary decision to speak because the "continuing effect of the coercive practices" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944)) may carry over to the second encounter despite the warnings. Cf. *Elstad*, 470 U.S. at 310 (requiring a break in the chain of events "[w]hen a prior statement is actually coerced"). There is therefore no need to apply a broad fruits doctrine in this context to deter police misconduct.

2. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals. Indeed, no other court of appeals has squarely addressed whether *Elstad*'s rationale applies to the admissibility of statements made by an indicted defendant who, after police "deliberately elicit" statements from him without first informing him of his rights, see *Massiah*, 377 U.S. at 206, is then informed of his *Miranda* rights, voluntarily waives them, and makes further statements. The court of appeals decisions peti-

tioner cites (Pet. 13) are inapposite.[5] The absence of any "conflict of decision in the federal system" on this issue strongly counsels in favor of "the issue receiv[ing] further study" in the courts of appeals "before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 962-963 (1983) (Stevens, J., respecting the denial of certiorari).

3. This Court's review is particularly unwarranted because petitioner's jailhouse statements would not be subject to suppression even under the fruits analysis

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[5] None of those cases involved the question whether a defendant's second statement, voluntarily made after receiving *Miranda* warnings, should be suppressed as the fruit of prior improper questioning. See *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1112-1117 (11th Cir. 1990) (applying "fruit of the poisonous tree" doctrine to testimony of other witnesses derived from Sixth Amendment violation); *United States* v. *Kimball*, 884 F.2d 1274, 1278-1279 (9th Cir. 1989) (affirming suppression of co-conspirator statements that were fruits of Sixth Amendment violation). The other cases either involve no Sixth Amendment issue, see *United States* v. *Faulkingham*, 295 F.3d 85, 94 (1st Cir. 2002) (need for deterrence did not warrant suppression of fruits of negligent violation of defendant's *Miranda* rights), cert. denied, 124 S. Ct. 2931 (2004); *United States* v. *Tedford*, 875 F.2d 446, 450-451 (5th Cir. 1989) ("fruit of the poisonous tree" doctrine does not apply to violations of Fed. R. Crim. P. 41(e)), or involved the separate question of whether statements elicited in violation of Sixth Amendment standards with respect to pending charges are admissible at the defendant's trial on "very closely related subsequent charges." And one decision, *United States* v. *Mitchell-ree*, 940 F.2d 1329, 1339-1345 (10th Cir. 1991) (admission of recorded conversation between defendant and informant required reversal of defendant's conviction for witness tampering, even though defendant had not been indicted on that charge when recording was made), rests on a Sixth Amendment premise that is no longer good law. See *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001) (when Sixth Amendment right to counsel attaches, it encompasses only those offenses that "would be considered the same offense under the *Blockburger* [v. *United States*, 284 U.S. 299 (1932),] test").

that he advocates. In the Fourth Amendment context, to determine whether a subsequent statement was sufficiently independent to dissipate the taint of the illegal search or seizure, the Court has examined the "temporal proximity" of the constitutional violation to the discovery of the derivative evidence in question, "the presence of intervening circumstances, and * * * the purpose and flagrancy of the official misconduct," to determine whether the confession was "an act of free will [sufficient] to purge the primary taint." *Kaupp* v. *Texas*, 538 U.S. 626, 632, 633 (2003) (per curiam) (quoting *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), and *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)). Under that standard, petitioner's jailhouse statement was not the fruit either of police misconduct or of his earlier statement, but was an independent and informed act of free will.

Although petitioner emphasizes (Pet. 21) that "only a half-hour" passed between petitioner's statement at his house and his interview at the jail, this Court has made clear that "relatively short" periods are sufficient to dispel the taint of illegality if, as here, the encounter with police was not "under the strictest of custodial conditions." *Rawlings* v. *Kentucky*, 448 U.S. 98, 107, 108 (1980) ("relatively short" 45-minute period between illegal detention and warned statement was sufficient to purge taint where suspects were detained "quietly in the living room" and police were courteous). Moreover, the officers' brief statement to petitioner at his house that they had come to discuss his involvement in distribution of methamphetamine and his association with co-conspirators did not "rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion" of petitioner's subsequent statements. *Id.* at 110. Nothing

the officers did at petitioner's house could have influenced petitioner's later decision, after receiving *Miranda* warnings, to waive counsel and answer questions. The officers, who were dressed in plain clothes and were not carrying weapons visibly, Suppression Hearing Tr. 8, 62, 66, did not offer petitioner any promises or inducements, did not apply any pressure, and did not even seek to persuade him of the wisdom of cooperating. In contrast to the cases on which petitioner relies (Pet. 19-22), nothing about the police conduct here suggests that the officers intended to overpower the defendant's will to resist. See *Kaupp*, 538 U.S. at 631-632 (warrantless arrest of a minor at 3 a.m., followed by his "removal from [the] house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene"); *Brown*, 422 U.S. at 605 (defendant arrested at gunpoint without probable cause, ordered to stand against wall, and subjected to search that was apparently "calculated to cause surprise, fright, and confusion").

In addition, as the court of appeals found, see Pet. App. 11a-12a, it is clear that the officers in this case made no effort to exploit petitioner's initial statement in order to obtain the second. There is no indication that the officers even mentioned the first statement to petitioner during the jailhouse interview, or reminded him of particular statements he had made, let alone attempted to convince petitioner that he had nothing more to lose by providing a full account of his actions. *Id.* at 7a, 11a. To the contrary, the officers gave petitioner full *Miranda* warnings, informing him that he did not have to speak with the officers without counsel present, and confirmed that he understood the warning. And the second statement did not merely repeat the minimal acknowledgment in his initial statement that he knew the

persons mentioned in the indictment and used methamphetamine in the past (without linking the two, see Pet. App. 33a; see also *id.* at 18a; Suppression Hearing Tr. 84). Rather, it covered new subjects that petitioner could not have believed he had already revealed to police, such as that he had bought drugs from some of the persons named by the officers, had loaned money to Kuenning that he suspected she had used for drugs, and knew other persons not named in the indictment. See Pet. App. 11a (second statement overlapped only "to a small degree with his initial unwarned * * * admissions"). Petitioner's valid waiver of his right to counsel makes it unlikely that petitioner was induced to speak by the knowledge that he had already made a statement to the officers. See *Rawlings*, 448 U.S. at 107 (fact that defendant "received *Miranda* warnings only moments before he made his incriminating statements" is "important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of" a constitutional violation). Based on all of the relevant factors, petitioner's decision to speak with the officers at the jailhouse was "sufficiently an act of free will to purge the primary taint" of the Sixth Amendment violation. *Wong Sun*, 371 U.S. at 486.

4. Review also is not warranted in this case because the court of appeals correctly ruled that any error in the admission of petitioner's jailhouse statement was harmless beyond a reasonable doubt. Like other constitutional errors, Sixth Amendment violations are harmless when it "appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder* v. *United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)); see *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972)

(*Massiah* violation harmless where "[t]he jury * * * was presented with overwhelming evidence of [the defendant's] guilt").

a. As the court of appeals noted (Pet. App. 13a), in addition to petitioner's statements to police, at trial "the government presented eight witnesses who detailed the extent of the conspiracy as well as [petitioner's] involvement in both possession and distribution of methamphetamine"). Petitioner's admissions during the jailhouse interview that he was acquainted with the other conspirators named in the indictment, that he had purchased small quantities of methamphetamine from individuals the officers identified, and that he had loaned money to Kuenning to pay her bills were largely, if not entirely, cumulative of the other witnesses' testimony, which, as the court of appeals noted, "went largely unchallenged." *Ibid.*; Gov't Supp. C.A. Br. 16-19. Petitioner contends that the admission of his jailhouse statements could not have been harmless because it corroborated the testimony of the seven cooperating witnesses, who, he claims, had "severe credibility problems." Pet. 25. But that overlooks the fact that the cooperating witnesses corroborated each other's testimony in important respects. See, *e.g.*, *United States* v. *Salimonu*, 182 F.3d 63, 71-72 (1st Cir. 1999) (concluding that error in admitting evidence was harmless beyond a reasonable doubt, emphasizing that "[t]he fact that the three co-conspirators' testimony was detailed and basically consistent * * * was substantial evidence of guilt"); *United States* v. *Valley*, 928 F.2d 130, 135 (5th Cir. 1991) (in determining that error was harmless beyond a reasonable doubt, noting that testimony of co-conspirators "was consistent and highly detailed"). For example, Kuenning, Geffs, and Sardeson each testified about a trip Kuenning and

Geffs made to Grand Island, Nebraska, to buy methamphetamine, and both Sardeson and Geffs confirmed that petitioner had supplied them with $1000 to purchase methamphetamine. See Trial Tr. 197-202, 316-322, 327, 382-386. Both Cotton and Kuenning (who also was called as a defense witness) testified that they went together to Tommy Gonzales to purchase methamphetamine, some of which they then supplied to petitioner. *Id.* at 248-252, 530-531, 537-563. Kuenning and Ernest Lawrence both testified that they traveled to Colorado together to buy methamphetamine and that they stopped by petitioner's house before they left and he gave them money, although their accounts of what Kuenning and petitioner said at his house differed. *Id.* at 237-241, 287-288, 497-506. Their testimony also was corroborated by physical evidence (for example, telephone records and personal address books, see *id.* at 140-145, 224).

Moreover, as the court of appeals noted (Pet. App. 13a), the jailhouse statements supported petitioner's defense theory—*i.e.*, that he was a methamphetamine user but was not involved in distributing the drug—and petitioner's counsel himself relied on the statements in his closing argument, noting that petitioner had steadfastly denied selling methamphetamine, despite being questioned repeatedly by a skilled interviewer who had been trained in interrogation techniques. See *ibid.*; Gov't Supp. C.A. Br. 19-20. Thus, as the court of appeals correctly concluded, "the introduction of [petitioner's] jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute." Pet. App. 13a. In any event, the factbound application of settled harmless-error principles does not

warrant review by this court. See *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) (noting that this Court reviews harmless-error claims "sparingly"); S. Ct. R. 10.

b. Petitioner contends (Pet. 23-25) that review is warranted because the court of appeals "did not apply the *Chapman* standard" (Pet. 23), and improperly equated harmless error review with sufficiency-of-the-evidence review. That claim is based on the court of appeals's statement in passing that "the evidence presented by the government * * * is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute," Pet. 24 (quoting Pet. App. 14a) (emphasis omitted), and on the court's citation of a sufficiency-of-the-evidence case in the course of its discussion. See *ibid.* (citing *United States* v. *Angular-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)). That claim lacks merit. Petitioner overlooks that the court recited the correct standard of review and noted that while "a defendant's own confession is 'a particularly potent piece of evidence,' its erroneous introduction is harmless where the other evidence against him is so substantial that it 'assured beyond a reasonable doubt that the jury would have returned a conviction even absent the confession.'" Pet. App. 12a (quoting *United States* v. *Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000)); accord *Hasting*, 461 U.S. at 512 (noting strength of evidence against defendant in determining whether error was harmless beyond a reasonable doubt); *Brown* v. *United States*, 411 U.S. 223, 231 (1973) ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence.").

In light of the court's recitation of the correct standard, the court of appeals' passing reference to "sufficien[cy]" (Pet. App. 14a) to discuss one established

factor in constitutional harmless-error analysis—the strength of the government's case—does not justify concluding that the court of appeals applied the incorrect standard. That is especially true because the Eighth Circuit (including in opinions written by the author of the decision below) repeatedly has emphasized that "sufficiency of the evidence and harmlessness of an error are different questions," *United States* v. *Kenyon*, 397 F.3d 1071, 1082 (2005), and that "sufficiency of the evidence alone is not enough to support a finding of harmless error." *United States* v. *Azure*, 801 F.2d 336, 341 (1986) (citing *United States* v. *Slader*, 791 F.2d 655, 657 n.2 (8th Cir. 1986)); see also *United States* v. *Hazelett*, 80 F.3d 280, 283 (1996) ("To say that absent certain inadmissible evidence the jury might have reached a different result is not at all the same thing as saying that without that evidence no jury could lawfully convict."); cf. *United States* v. *Ryan*, 153 F.3d 708, 712 (1998) (Wollman, J., for the court) (emphasizing that "a materiality determination [for purposes of *Brady* v. *Maryland*, 373 U.S. 83 (1963)] is not a sufficiency of evidence test"). Further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-1552

IN THE

# Supreme Court of the United States

JOHN J. FELLERS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

### I. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER *OREGON* V. *ELSTAD* CONTROLS THIS CASE

Two years ago, this Court granted review in this case to decide, among other things, whether the traditional "fruits" analysis governing evidence derived from constitutional violations is displaced by the rule of *Oregon* v. *Elstad*, 470 U.S. 298 (1985), when the primary constitutional violation is police "deliberate elicitation" of an incriminating statement from an indicted defendant, in violation of his Sixth Amendment right to the assistance of counsel. *See* Pet., No. 02-6320, Questions Presented (II), 17-23. Although the Court ultimately did not reach that issue, *see Fellers* v. *United States*, 540 U.S. 519, 525 (2004), the previous grant of certiorari demonstrates that the question is an important one that warrants resolution by this Court.

The Court's decision that petitioner's Sixth Amendment rights were violated by the police in this case, *see* 540 U.S. at 524, refutes the main theme underlying the government's brief in opposition and indeed its arguments throughout the history of this case—namely, that there is no difference between the protections offered by the Fifth and Sixth Amendments to individuals questioned by the police. *See, e.g.*, Br. in Opp. 9, 10, 14. To the contrary, the *holding* of this Court's decision in this case is that the standards for ascertaining whether evidence is obtained in violation of those commands are different, precisely because the two commands are different in substance.

The Fifth Amendment prohibits the government from coercing a statement from any suspect (whether indicted or not). Accordingly, *Miranda* v. *Arizona*, 384 U.S. 436 (1966)—which implements the Fifth Amendment guarantee—applies when the police "interrogate" a suspect in a manner that is likely to be coercive (including a custodial setting). *See Fellers*, 540 U.S. at 524. The Sixth Amendment's guarantee of the assistance of counsel, which applies only to those who have been formally "accused" in a criminal prosecution, protects the criminal defendant from more than

coercion; it serves to ensure evenhandedness in the adversarial process. "'[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability.'" *Id.* (quoting *Michigan* v. *Jackson*, 475 U.S. 625, 632 n.5 (1986)). So, as the Court made clear here, the Sixth Amendment is violated when government agents "deliberately elicit[]" an incriminating statement from an accused, even in a setting that might not amount to "interrogation" (because, for example, the setting was not custodial). *See id.; see also United States* v. *Henry*, 447 U.S. 264, 273 n.11 (1980) (noting there is no "custody" requirement in "this branch of the Sixth Amendment").

In this case, the police violated petitioner's Sixth Amendment right to counsel when they deliberately elicited incriminating statements from him at his home in the absence of counsel. *See Fellers*, 540 U.S. at 524. As the government acknowledges (Br. in Opp. 12), this Court has previously recognized that the "fruit of the poisonous tree" doctrine applies to such Sixth Amendment violations. There is no question, for example, that physical evidence derived from such a violation would have to be suppressed, absent an exception to the derivative-evidence rule or a demonstration by the government of taint attenuation under that rule. *See, e.g., Nix* v. *Williams*, 467 U.S. 431, 442 (1984); *see also United States* v. *Patane*, 124 S. Ct. 2620, 2629 (2004) (again noting that the exclusionary rule in this Sixth Amendment context covers all illegally obtained evidence and "other incriminating evidence *derived from*" the violation) (emphasis added) (quotation omitted). The same would be true of a statement derived from earlier unconstitutional conduct by the police, unless some event had intervened to ensure that the second statement was not the product of the first—a point on which the government would have the burden of proof. *See, e.g., Elstad*, 470 U.S. at 309-310 (Fifth Amendment); *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982) (Fourth Amendment).

The only question here, then, is whether the fact that the police administered *Miranda* warnings between the

first, unconstitutionally-obtained statement and the second statement is sufficient *as a matter of law* to relieve the government of its normal burden of proving attenuation. *Elstad* provides no support for the government's position that it does, for two reasons.

First, *Elstad*'s special admissibility rule is premised particularly on the absence of any constitutional violation. *See, e.g., Elstad*, 470 U.S. at 305. There was no suggestion in *Elstad* that the initial statement was coerced from the defendant. This case, by contrast, involves the fruit of an actual constitutional violation.[1] This Court has never held that

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[1] The government does not dispute here, nor did it dispute below, that this Court based *Elstad* on the absence of an initial constitutional violation. Nor does the government endorse the court of appeals' reasoning that this Court, in *Dickerson* v. *United States*, 530 U.S. 428 (2000), somehow implicitly undermined that express basis for the *Elstad* ruling. Rather, the government seeks to revise the rationale of *Elstad* by intimating (without expressly arguing) that *Elstad* declined to apply the "fruits" doctrine because there was no "completed" Fifth Amendment violation there. The government then draws a putative analogy to the Sixth Amendment, arguing that a "deliberate elicitation" violation is also not complete until trial. *See* Br. in Opp. 10-11. The timing of the so-called "completion" of any constitutional violation was not the basis of *Elstad*, nor has it ever proved relevant to the Court's cases applying the derivative-evidence rule. *See, e.g., Chavez* v. *Martinez*, 538 U.S. 760, 767-770 (2003) (plurality opinion) (holding that violation of Self-Incrimination Clause is not complete until trial, yet reaffirming that regardless whether a coerced statement is admitted at trial, the Constitution requires the exclusion of all evidence derived from that statement); *see also United States* v. *Hubbell*, 530 U.S. 27, 37 (2000).

In any event, the government's argument that the "deliberate elicitation" of an incriminating statement from an indicted defendant is not an actual violation of the Sixth Amendment, unless and until that statement is introduced at trial, is meritless. As the Court made clear in *Henry*, an indicted defendant has a Sixth Amendment right to the assistance of counsel at certain "postindictment confrontations between Government agents and the accused" *precisely because* they are "'critical stages' of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches." 447 U.S. at 269. In other words, such confrontations are part of the "criminal prosecution[]" to which Sixth Amendment guarantees apply—no less than an arraignment or a guilty plea proceeding. When the accused is denied the assistance of counsel at such a "critical

the administration of *Miranda* warnings alone, as a matter of law, is sufficient to obviate the need for a "fruits" inquiry in such circumstances. Indeed, as the government acknowledges (Br. in Opp. 14), *Elstad* itself observed that, if that case had involved an actual violation of Fifth Amendment standards, the traditional "fruits" analysis would have governed, rather than the rule adopted by the Court in that case. *See Elstad*, 470 U.S. at 310 (requiring different analysis when "a prior statement is actually coerced") (quoted also at Br. in Opp. 14). Thus, as the Court has stressed repeatedly, the mere fact that a defendant's statement is obtained after provision of *Miranda* warnings and therefore is presumptively *voluntary* does not, by itself, mean that the statement is not the fruit of an earlier constitutional violation and therefore need not be suppressed. *See, e.g., Kaupp* v. *Texas*, 538 U.S. 626, 633 (2003) (*per curiam*).

Any other rule would provide little deterrence to police violation of constitutional rights—the fundamental purpose of the exclusionary rule—for it would make *Miranda* warnings sufficient, as the government puts it, to "neutralize[]" prior unconstitutional conduct by the police (Br. in Opp. 9). Even without a prior violation of the Sixth Amendment, if the government seeks to admit a deliberately elicited, uncounseled, post-indictment statement against the defendant, it must prove that the defendant was apprised of the nature of his right to counsel and the consequences of waiving it; that he thereafter waived that right; and that he made any statement voluntarily. *See, e.g., Dickerson* v. *United States*, 530 U.S. 428, 434 (2000) (voluntariness); *Patterson* v. *Illinois*, 487 U.S. 285, 292 (1988) (waiver). But, in the government's view, the fact that a prior violation of the Sixth

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stage," a violation of his Sixth Amendment right is complete. The government relies principally on *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), but that case held only that no claim under 42 U.S.C. § 1983 would lie based solely on the fact that an undercover agent had participated in discussions between a defendant and his attorney. The Court did *not* suggest that the Sixth Amendment would have been violated only if the undercover agent had testified at trial. *See id.* at 554.

Amendment *had* occurred makes no difference; the provision of *Miranda* warnings followed by a waiver should still be sufficient to render the statement admissible. In other words, the government suggests that it is entitled to one free Sixth Amendment violation, and if that violation produces something of interest to the police, the violation can be "neutralized" by *Miranda* warnings and the questioning can begin anew. *Elstad* certainly does not stand for such a proposition. *Cf. Missouri* v. *Seibert*, 124 S. Ct. 2601, 2610 (2004) (plurality opinion) (decrying "[t]he object of question-first" effected "to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed").

*Elstad* does not apply here for a second reason: the rationale of the decision is closely tied to the Fifth Amendment principles underlying *Miranda*. The purpose of the *Miranda* requirement is to "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause" of the Fifth Amendment. *Seibert*, 124 S. Ct. at 2608 (plurality) (quoting *Chavez* v. *Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part)). *Elstad* recognizes that, when the police properly secure a voluntary statement, there is ordinarily no reason *in the policy of the Fifth Amendment* to suppress that statement, even though it might have been preceded by an unwarned (yet voluntary) statement. But *Elstad* does not suggest that all voluntary statements secured after *Miranda* warnings are necessarily free from constitutional concern. As the Court recognized previously in this case, police conduct to secure a statement may well violate the Sixth Amendment even if the statement is given voluntarily. *See Fellers*, 540 U.S. at 524; *see also Henry*, 447 U.S. at 273-274.

The purpose of the Sixth Amendment is not so much to prevent police compulsion as to ensure that a person formally charged with a crime has expert legal assistance in navigating the shoals of the criminal justice system. *See, e.g., Maine* v. *Moulton*, 474 U.S. 159, 169 (1985). Given that many defendants may not appreciate that they are entitled

to the assistance of a lawyer in a post-indictment encounter with the police—even if they might understand that they would be entitled to legal assistance at trial—there is a heightened concern that a defendant, having already given one incriminating statement without a lawyer present, would fail to perceive how a lawyer could assist him in a second round of questioning. Accordingly, even if the *Miranda* warnings normally dispel any possible taint of compulsion from the previous elicitation of an unwarned voluntary statement, those warnings are not themselves sufficient as a matter of law to dispel the distinct taint from a Sixth Amendment violation—at least where, as here, little time has passed, the defendant has been held in custody throughout, and the defendant has neither seen a lawyer nor been brought before a magistrate.

*Patterson* v. *Illinois* is not to the contrary. The Court held there that, ordinarily, *Miranda* warnings followed by a valid waiver of rights will suffice to waive a defendant's Sixth Amendment right to the assistance of counsel at a post-indictment police interview. *See* 487 U.S. at 293. But *Patterson* did not hold that a *Miranda* warning eliminates all Sixth Amendment concerns whatsoever. Indeed the Court specifically noted that, "because the Sixth Amendment's protection of the attorney-client relationship—'the right to rely on counsel as a "medium" between [the accused] and the State'—extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." *Id.* at 297 n.9 (internal citation omitted).[2] Nor, of course, did *Patterson* involve any situation in which the provision of *Miranda* warnings had been preceded by a constitutional violation, as is true here.

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[2] As an example, the Court gave the waiver of rights after *Miranda* warnings upheld in *Moran* v. *Burbine*, 475 U.S. 412 (1986); the Court made clear that, "in the Sixth Amendment context, this waiver would not be valid." *Patterson*, 487 U.S. at 296 n.9.

*Miranda* warnings do not purge the taint of a prior Sixth Amendment violation as a matter of law—just as they do not purge the taint of a prior Fourth or Fifth Amendment violation as a matter of law, which this Court has held many times. Rather, the proper question is whether the government has proven, under the traditional "fruits" analysis, that the causal link between the first and second statements was broken. The government has not made this showing.

## II. The Second Statement Was The Fruit Of The First

Having concluded that *Elstad* ousted the traditional "fruits" doctrine in this context, the court of appeals did not resolve this case by applying that doctrine, which requires examining several factors to determine whether evidence was derived from prior unconstitutional conduct. Nevertheless, application of that doctrine would plainly require suppression of petitioner's jailhouse statements. Only one factor supports the statements' admission: the belated administration of *Miranda* warnings. This Court has made indisputably clear, however, that the provision of such warnings, standing alone, is legally insufficient to justify admission of evidence derived from the violation of a defendant's constitutional rights. *See, e.g., Kaupp*, 538 U.S. at 632-633; *Brown* v. *Illinois*, 422 U.S. 590, 604-605 (1975).

As for the other traditional factors, they all point decisively towards suppression of petitioner's second statement. Understandably, the government does not argue that the temporal proximity of the Sixth Amendment violation to petitioner's jailhouse statements favors admission. Rather, the government seeks to minimize the significance of the short passage of time between the two statements (30 minutes) by contending that petitioner was not strictly confined during that period. *See* Br. in Opp. 16. In fact, the officers, after eliciting petitioner's first statements, removed him from his home under arrest, transported him to the jail, and commenced an interrogation. *See* Joint Appendix, *Fellers* v. *United States*, No. 02-6320 (*Fellers* JA), at 21-24, 50-51. When petitioner moved to retrieve his shoes, Deputy Bliemeister followed him, explaining that "you're under arrest.

Wherever you go in the house, I need to go also." *Id.* at 59. This conduct stands in marked contrast to *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), on which the government relies, where officers allowed the defendant to move freely about his house, and even to "put an album on" (*id.* at 108). The brief 30-minute period between petitioner's two statements, during which he was confined throughout, could not "possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691.

The government does not even attempt to argue that there were any meaningful intervening circumstances between the officers' elicitation of incriminating statements at petitioner's home and the later interrogation. As for the flagrancy of the official misconduct in this case, the government does not argue that the officers acted in good faith when they deliberately elicited inculpatory statements from petitioner outside the presence of counsel regarding the charges in the indictment. Nor could the government make such an argument; the rule of *Massiah* v. *United States*, 377 U.S. 201 (1964), prohibiting such tactics, has long been clear, as demonstrated by this Court's unanimous decision in this case. Rather, the government attempts to distract the Court's attention from this factor by focusing on facts irrelevant to the flagrancy of the officers' Sixth Amendment violation. *See* Br. in Opp. 17. Whether the officers carried visible weapons or intended to overpower petitioner's will, while perhaps relevant to the Fifth Amendment, is irrelevant to a determination whether their violation of the Sixth Amendment was flagrant.

Finally, contrary to the government's claim (Br. in Opp. 17-18), the link between petitioner's first and second uncounseled statements is unmistakable. At petitioner's home, the officers elicited admissions on three subjects that they subsequently reviewed (and re-elicited) at the jail: that petitioner previously had been a user of methamphetamine; that he had (during the same period) associated with the persons alleged to have been his co-conspirators; and that he had

(again during the same period) been subject to a number of personal and financial problems. *See Fellers* JA at 18, 20-21, 29-33, 35-36, 47-48, 51-52, 73, 79, 89. The officers then followed textbook policy in exploiting those admissions to obtain a more elaborate confession at the jailhouse. *See* Trial Transcript (Tr.) 91-92, 177. It would have been entirely reasonable for a nonlawyer such as petitioner to have thought that, because he had already admitted to the police that he was both a methamphetamine user and an associate of the alleged co-conspirators during the time of the alleged conspiracy, it was incumbent upon him to respond to the officers' jailhouse questions asking for additional details. A lawyer, of course, could have advised petitioner that the initial statement could be suppressed and that it might well be better to remain silent. The government in this case exploited its advantage over an uncounseled defendant lacking legal knowledge and skill. That is exactly what the Sixth Amendment is intended to prevent.

## III. THE COURT OF APPEALS' HARMLESS-ERROR HOLDING CONTRAVENES WELL-ESTABLISHED PRECEDENT OF THIS COURT

The government concedes that the court of appeals articulated a standard flatly inconsistent with the constitutional harmless-error standard, but attempts to minimize the error by asserting that the lower court made only "passing" references to its improper standard. *See* Br. in Opp. 21-22. The assertion does not withstand scrutiny. The court of appeals relied squarely on its erroneous evidence-sufficiency standard to reject petitioner's central harmless-error argument—that the government used his jailhouse statements to shore up the credibility-challenged testimony of its own witnesses. The importance of the court of appeals' sufficiency-of-the-evidence finding is plain from the opinion's concluding words on the harmless-error subject:

> [T]he evidence presented by the government in this case is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute. Accordingly, any error in admitting [petitioner's] jailhouse statements was harmless.